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No. 98-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KERMIE M. KING,

Petitioner,

v.

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Herbert J. Thomas Memorial Hospital Association is a non-stock, tax exempt, not for profit corporation. It has no parent corporation, but has two sister corporations which include Health Care Connection, Inc., a non-stock, not for profit, taxable medical corporation, and Thomas Memorial Hospital Foundation, a non-stock, not for profit corporation. Herbert J. Thomas Memorial Hospital Association has two wholly owned subsidiary corporations, Thomas Valuecare Inc. which is a not for profit corporation, and TMH Services, Inc. which is a for profit corporation. In turn, TMH Services, Inc. has six nonwholly owned for profit subsidiary businesses, which include Ashton Partners, Bennett Partners, Division Street Partners, Homecare Connection, L.L.C., IBO Services, THP Partners, and TriQuest, Inc.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Law Involved	1
Statement of the Case	1
Statement of Facts	4
Reasons for Denying the Writ	6
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Life Ins. Co. of Hartford v. Haworth, 300 U.S. 227 (1937) 7

August v. Offices Unlimited, Inc., 981 F.2d 576 (1st Cir. 1992) 9

Budd v. ADT Sec. Systems, Inc., 103 F.3d 699 (8th Cir. 1996) 9

Cline v. Western Horseman, Inc., 922 F. Supp. 442 (D. Col. 1996) 11

Erit v. Judge, Inc., 961 F. Supp. 774 (D.N.J. 1997) . 9

Flast v. Cohen, 392 U.S. 83 (1968) 7

Fussell v. Georgia Ports Auth., 906 F. Supp. 1561 (S.D. Ga. 1995), *aff'd*, 106 F.3d 417 (11th Cir. 1997) .. 11

Gaddy v. Four B. Corp., 953 F. Supp. 331 (D. Kan. 1997) 17

Garcia-Paz v. Swift Textiles, Inc., 873 F. Supp. 547 (D. Kan. 1995) 9, 10

Harris v. Marathon Oil Co., 948 F. Supp. 27 (W.D. Tex. 1996) 9

Cited Authorities

	Page
Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215 (D.S.C. 1996)	9
Johnson v. U.S. Steel Corp., 943 F. Supp. 1108 (D. Minn. 1996)	9
Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997)	9, 10
McNemar v. The Disney Stores, Inc., 91 F.3d 610 (3d Cir. 1996)	9
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)	17
Miller v. U.S. Bancorp, 926 F. Supp. 994 (D. Or. 1996)	9
Nguyen v. IBP, Inc., 905 F. Supp. 1471 (D. Kan. 1995)	11
Pegues v. Emerson Elec. Co., 913 F. Supp. 976 (N.D. Miss. 1996)	11
Public Employees Retirement System v. Betts, 492 U.S. 158 (1989)	17
Reigel v. Kaiser Foundation Health Plan of North Carolina, 859 F. Supp. 963 (E.D.N.C. 1994)	10, 16

Cited Authorities

	Page
Ross v. Indiana State Teacher's Ass'n., 955 F. Supp. 1025 (N.D. Ind. 1997)	9
Shafer v. Preston Memorial Hosp. Corp., 107 F.3d 274 (4th Cir. 1997)	17
Simo v. Home Health & Hospice Care, 906 F. Supp. 714 (D.N.H. 1995)	16
Smith v. Midland Brake, Inc., 911 F. Supp. 1351 (D. Kan. 1995)	9
Taylor v. Food World, Inc., 946 F. Supp. 937 (N.D. Ala. 1996)	9
United States v. Evans, 213 U.S. 297 (1909)	7
Wells v. North Carolina Bd. of Alcohol Control, 714 F.2d 340 (4th Cir. 1983)	15
Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996)	17
Statutes:	
29 U.S.C. § 621 *et seq.*	1, 2
29 U.S.C. § 1101 *et seq.*	2
42 U.S.C. § 423(d)(a)(A)	11

Cited Authorities

	Page
42 U.S.C. § 1983	1, 2
42 U.S.C. § 2000e *et seq.*	1, 2
W. Va. Code § 5-11-9 *et seq.*	1, 2
W. Va. Code § 5-11-9(1)	11, 17
Rules:	
Sup. Ct. R. 10(a)	8
Sup. Ct. R. 12(3)	4
Other Authorities:	
20 C.F.R. § 404.603 (1995)	14
20 C.F.R. § 404.703 (1995)	14
20 C.F.R. § 404.705 (1995)	14
20 C.F.R. § 404.900 (1995)	14
20 C.F.R. § 404.1505 (1995)	11

LAW INVOLVED

The law involved in this matter is the application of the doctrine of judicial estoppel to a claim of age discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-9 *et seq.* This case does not involve, nor has petitioner ever pled, a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq.*, or 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The petitioner, Kermie Marie King ("King"), was discharged from employment with respondent, Herbert J. Thomas Memorial Hospital ("Thomas"), on September 9, 1987. King was discharged because she falsified entries on her time card in violation of Thomas' written policies.

On November 2, 1987, King filed a charge of age discrimination with the West Virginia Human Rights Commission. The Commission investigated the charge and on April 5, 1988, issued a determination that there was no probable cause to believe that King was discharged because of her age. For reasons unknown, the Commission issued another determination six years later. On September 15, 1994, the Commission again found no probable cause to believe that King had been discriminated against on the basis of her age. On September 22, 1994, King requested an administrative review of the no probable cause determination, which review was held on December 14, 1994. On January 15, 1995, the Commission affirmed the no probable cause determination and provided King with a notice of right to sue.

On March 15, 1995, King instituted a lawsuit against Thomas in the Circuit Court of Kanawha County, West Virginia. King asserted several causes of action, including age discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-9 *et seq.*, wrongful discharge, and intentional infliction of emotional distress, but raised no claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Age Discrimination In Employment Act, 29 U.S.C. § 621 *et seq.*, or 42 U.S.C. § 1983. Based upon allegations in the complaint that Thomas discharged King for the purpose of interfering with the attainment of retirement benefits, Thomas removed the matter to the United States District Court for the Southern District of West Virginia on April 5, 1995, upon the grounds that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1101 *et seq.*, preempted King's state law claims.

By Memorandum Order dated August 22, 1996, the District Court granted in part Thomas' Motion for Summary Judgment. The court ruled that King's claims of wrongful discharge, intentional infliction of emotional distress, and ERISA violations were barred by the applicable statutes of limitations (Petitioner's Supplemental Appendix A). The court denied Thomas' motion as it related to King's age discrimination claims, and denied without prejudice Thomas' motion based on the doctrine of judicial estoppel, pending further briefing (*Id.*).

On December 11, 1996, the District Court revisited the issue of whether King's age discrimination claim was barred by the doctrine of judicial estoppel. By Memorandum Order of that date, the District Court found that King was terminated from employment on September 9, 1987; that she applied for disability benefits from the Social Security Administration;

that on December 12, 1988, she was notified that she was eligible to receive those benefits retroactive to September 2, 1987, one week prior to her discharge; that she continues to date to receive those benefits; that in order to prevail upon her age discrimination claim under the West Virginia Human Rights Act she must prove that at the time of the alleged discriminatory action she was able and competent to perform the services required of her employment; and that the doctrine of judicial estoppel bars her from claiming that she was able to work at the same time she claimed to the Social Security Administration that she was unable to work. Thus, the District Court granted summary judgment to Thomas upon King's claims which had survived the August 27, 1996 order (Petitioner's Supplemental Appendix B).

King then appealed the latter decision to the United States Court of Appeals for the Fourth Circuit. By order dated October 30, 1998, the Fourth Circuit Court of Appeals ruled that the doctrine of judicial estoppel barred King from asserting in court that she was able and competent to perform the services required of her job at Thomas, a necessary prerequisite to an age discrimination claim under the West Virginia Human Rights Act, while at the same time successfully asserting to the Social Security Administration that she was disabled and thus unable to do her previous work at Thomas (Petition Appendix, pp. 5-9). Moreover, the Fourth Circuit Court of Appeals further ruled on the merits of King's age discrimination claim, concluding that no reasonable jury could find that King's discharge was the result of age discrimination on the part of Thomas (Petition Appendix, pp. 9-11).

King now seeks a writ of certiorari as to the Fourth Circuit Court of Appeals' application of the doctrine of judicial

estoppel, *but not* as to that court's decision on the merits of her age discrimination claim (*see, e.g.*, Petition, p. i). The case was placed on this Court's docket on March 2, 1999; however, to date petitioner has not complied with the notification requirements of the Rules of the Supreme Court of the United States, Rule 12(3).

STATEMENT OF FACTS

King was hired by Thomas in 1962. Her entire employment was in the Dietary Department where she performed duties such as working on the food tray line, delivering food trays to patients, filing cards in the office, etc. Also during the entirety of her employment her hours of work were 6:00 a.m. to 2:30 p.m.

On Saturday, August 27, 1987, King left the Dietary Department at 2:20 p.m., although she was scheduled to work until 2:30. King was seen by her supervisor, Darlene Kestner, getting into a truck and leaving the premises at approximately 2:26 p.m. Ms. Kestner then reviewed King's time card, upon which King had entered that she worked until 2:30.

On September 8, 1987, Ms. Kestner and the Department Head, Margaret Eagloski, met with King concerning her falsification of her time card. At that time, King was warned that any further such falsifications would result in a three-day suspension. This discipline, however, was not in accordance with established Hospital policy, which required termination for such an infraction.

Normally, the supervisor or department head writes up the infraction and the discipline, and brings it to the personnel

director for approval prior to presenting it to the employee. In this case, the discipline was given to King prior to approval by Donna Arbogast, the Personnel Director, and subsequently given to Ms. Arbogast. At that time, Kestner was new in her supervisory position and Eagloski was in an acting capacity as the Director of the Dietary Department. Moreover, Kestner and Eagloski were not employees of the Hospital, but rather were employees of ARA, a company which provided a management contract for dietary services at the Hospital.

When the disciplinary action was presented to Ms. Arbogast, she immediately changed it to conform with Hospital policy. The Employee Handbook issued to all employees, including King, specifically provides that the *first offense* of falsification of a time card carries the penalty of discharge. Furthermore, the Hospital's Policy for Recording Time Worked and Instructions for Time Card Recording provides in pertinent part: "*RECORD THE ACTUAL TIME WHEN COMMENCING WORK AND THE ACTUAL TIME WHEN CONCLUDING WORK. (FALSIFICATION OF TIME CARD WILL RESULT IN TERMINATION)*" (emphasis in original). This policy was kept in the front of every time card book in the Hospital, and was in the time card book upon which King signed her time out on August 27, 1987.

Consequently, Ms. Arbogast met with King, Kestner, and Eagloski on September 9, 1987. At that meeting, Ms. Arbogast confronted King, who admitted that she had left prior to 2:30 but marked her time card as if she had left at 2:30. Moreover, King admitted that she had done this on other occasions. Therefore, Ms. Arbogast informed King that there had been a falsification of her time card and that immediate termination was proper at that point. King was fully aware

that falsifying a time card was grounds for discharge, and she was in fact discharged solely for this reason.[1]

King became physically unable to work while she was still employed at Thomas or shortly thereafter. She filed a claim for disability benefits with the Social Security Administration, which claim was approved on December 12, 1988. At that time, the Social Security Administration determined that King became disabled on September 2, 1987, one week prior to her discharge. King has continued to receive Social Security disability benefits to the present.

REASONS FOR DENYING THE WRIT

A. The Fourth Circuit Court of Appeals decided this case of alleged age discrimination on two separate bases: (a) the application of the doctrine of judicial estoppel to a claim of age discrimination arising under the West Virginia Human Rights Act, which King asserts to be error (Petition Appendix, pp. 5-9); and (b) King's failure to produce sufficient evidence to give rise to an inference of age discrimination under West Virginia law, or to produce sufficient evidence that Thomas' asserted valid nondiscriminatory reason for King's discharge was pretextual (Petition Appendix pp. 9-11), which King does not raise as an assignment of error (*see, e.g.*, Petition, p. i).

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1. Not only was King discharged for falsification of her time card, every other individual who committed this infraction of Hospital policy has likewise been discharged. These include, in addition to King, Tamalena Stover (age 19), Roberta Mann (age 25), Cheryl Miller (age 23), Allan Gurley (age 35), Paul Newman (age 31), Nila Bird (age 35), George Baria (age 33), Kristina Riffee (age 22), Ann Taylor (age 32), Leigh Roberts (age 28), Bonita Chapman (age 22), Wendy Ashley (age 23), Joyce Wick (age 41), Amanda Skeens (age 18) and Carole Morton (age 36).

Consequently, King's request for a review of the application of the doctrine of judicial estoppel, even if granted, would not change the outcome of the case, which was decided on its merits.

Essentially, King seeks an advisory opinion from the Court on a nondispositive issue, when there is no existing justiciable controversy. In *Aetna Life Ins. Co. of Hartford v. Haworth*, 300 U.S. 227 (1937), this Court defined a justiciable controversy as one that

> must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240-41 (citations omitted). Indeed, "the oldest and most consistent thread in the concept of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Thus, in cases such as the one at bar, this Court routinely refuses to give advisory opinions on questions that cannot affect the relations of the parties. *United States v. Evans*, 213 U.S. 297 (1909). Accordingly, because the Fourth Circuit Court of Appeals has decided this case on its merits on grounds other than those asserted by King to be error, the Court should refuse to grant the petition for writ of certiorari.

B. This case does not present any of the considerations the Court utilizes in exercising its broad discretion to grant a petition for writ of certiorari. Sup. Ct. R. 10(a). This case involves the application of the federal common law procedural doctrine of judicial estoppel to a claim asserted under West Virginia substantive state law. Given the very nature of this case, it cannot be contended that the Fourth Circuit Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same issue.

Nor has the Fourth Circuit Court of Appeals decided an important federal question in a way which conflicts with a decision of the Supreme Court of Appeals of West Virginia. Indeed, the West Virginia Supreme Court has not issued a published opinion on the application of the doctrine of judicial estoppel to cases arising under the West Virginia Human Rights Act, and King has not asserted that the Fourth Circuit Court of Appeals' decision in the case *sub judice* is in conflict with such a decision.

Finally, the Fourth Circuit Court of Appeals has not departed from the accepted and usual course of judicial proceedings, or sanctioned the same by the United States District Court for the Southern District of West Virginia. King's petition does not assert that such a departure occurred in either court. Therefore, none of the considerations identified in the Rules of the Supreme Court of the United States, Rule 10(a) are present in this case, and the Court should, therefore, deny King's request for a writ of certiorari.

C. The lower courts properly ruled that King is judicially estopped from pursuing her claim of age discrimination under the West Virginia Human Rights Act because: (1) she adopted a position before the courts that she is able and competent to perform her job duties, while she maintained before the Social Security Administration that she was totally disabled from performing that job; (2) the Social Security Administration accepted King's prior inconsistent position by instituting payments and ruling that she was disabled one week prior to her discharge; and (3) King intentionally attempted to mislead the lower courts to gain an unfair advantage in this litigation. These findings comport with the standards of judicial estoppel announced in *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997).

The law is well-established that plaintiffs will not be permitted to claim to the Social Security Administration that they are so impaired they cannot work and, at the same time, claim in a discrimination lawsuit that they can go to work and perform their jobs. These claims are mutually exclusive, and plaintiffs are judicially estopped from taking these diametrically opposed positions. *Budd v. ADT Sec. Systems, Inc.*, 103 F.3d 699 (8th Cir. 1996); *McNemar v. The Disney Stores, Inc.*, 91 F.3d 610 (3d Cir. 1996); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992); *Erit v. Judge, Inc.*, 961 F. Supp. 774 (D.N.J. 1997); *Ross v. Indiana State Teacher's Ass'n.*, 955 F. Supp. 1025 (N.D. Ind. 1997); *Harris v. Marathon Oil Co.*, 948 F. Supp. 27 (W.D. Tex. 1996); *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215 (D.S.C. 1996); *Taylor v. Food World, Inc.*, 946 F. Supp. 937 (N.D. Ala. 1996); *Johnson v. U.S. Steel Corp.*, 943 F. Supp. 1108 (D. Minn. 1996); *Miller v. U.S. Bancorp*, 926 F. Supp. 994 (D. Or. 1996); *Smith v. Midland Brake, Inc.*, 911 F. Supp. 1351 (D. Kan. 1995); *Garcia-Paz v. Swift Textiles, Inc.*, 873

F. Supp. 547 (D. Kan. 1995); *Reigel v. Kaiser Foundation Health Plan of North Carolina*, 859 F. Supp. 963 (E.D.N.C. 1994).

The doctrine of judicial estoppel is designed to protect the integrity of the judicial process by "prevent[ing] a party from playing fast and loose with the court." *Lowery*, 92 F.3d at 223 (citations omitted). "[The doctrine] precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation." *Id.*

In *Lowery*, the Fourth Circuit Court of Appeals identified three elements necessary for the application of the doctrine. The Court explained:

> First, the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation.
>
> * * *
>
> Second, the prior inconsistent position must have been accepted by the court.
>
> * * *
>
> Finally, the party sought to be estopped must have intentionally misled the court to gain unfair advantage.

Lowery, 92 F.3d at 224 (citations and quotations omitted). Both the District Court and the Fourth Circuit Court of Appeals correctly found all of these elements to be present in the instant case.

Initially, King is taking a factual position which is contrary to a position she took before the Social Security Administration in her pursuit of Social Security disability benefits. Disability under the Social Security Act is defined as an inability to engage in any substantial gainful activity,

> by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

See Cline v. Western Horseman, Inc., 922 F. Supp. 442, 446 (D. Col. 1996), *citing* 42 U.S.C. § 423(d)(a)(A). The Act's underlying regulations explain,

> [t]o meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy.

Id., *citing* 20 C.F.R. § 404.1505 (1995). Thus, the very definition of disability within the meaning of Social Security law is directly contrary to the concept that an individual is able to perform her job. *See also Pegues v. Emerson Elec. Co.*, 913 F. Supp. 976 (N.D. Miss. 1996); *Fussell v. Georgia Ports Auth.*, 906 F. Supp. 1561 (S.D. Ga. 1995), *aff'd*, 106 F.3d 417 (11th Cir. 1997); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995). On the other hand, the West Virginia Human Rights Act expressly states that an employment action is an unlawful discriminatory practice if an employer discriminates against an individual who is "able and competent to perform the services required." W.Va. Code § 5-11-9(1).

In order to obtain disability benefits, King had to assert before the Social Security Administration that she was unable to perform her job at Thomas or any other job. In fact, King admitted that she was physically unable to work at the time of her discharge from the Hospital. However, in order to maintain a claim for damages under the West Virginia Human Rights Act, King must demonstrate that she was able to work after her discharge. Thus, she has asserted contradictory factual allegations in two forums of litigation.

Next, the Social Security Administration accepted King's factual assertion that she was unable to work after her discharge from Thomas on September 9, 1987, and she has received Social Security disability benefits since that time. In fact, the Administration found that King was disabled as of September 2, 1987 — one week before her discharge. Consequently, the prior forum accepted King's earlier inconsistent factual assertion.

Finally, King's attempt to assert a position in this lawsuit contrary to her position before the Social Security Administration effectively misleads the courts in an attempt to recover damages to which she is not entitled. King has taken one position before the Social Security Administration and the opposite position before the courts. Her position before the Social Security Administration was not accidental or inadvertent. She wanted to obtain disability benefits; therefore, she had to assert that she was unable to work after her September 1987 discharge from the Hospital. On the other hand, to maintain a claim for age discrimination under the West Virginia Human Rights Act, King must demonstrate that she was able to perform the required functions of her job. However, King cannot make one factual assertion to have the advantage of collecting disability benefits, then make the

opposite assertion to have the advantage of collecting damages for employment discrimination. Consequently, the lower courts found that all the necessary elements for the application of judicial estoppel are present in this action.

King argues that the lower courts merely mechanically applied the doctrine of judicial estoppel to act as a *per se* bar to her claim of age discrimination (*see* Petition, p. 7). This is clearly not the case. Rather, both the District Court and the Fourth Circuit Court of Appeals looked carefully at the specific facts of this case and determined that, under the particular circumstances of this case, the doctrine of judicial estoppel should apply to preclude King from asserting a necessary element of her West Virginia age discrimination case.

King implies that she was not disabled until 15 months after her discharge, when she was awarded Social Security disability benefits. Her claim is ingenuine for several reasons. First, the Social Security Administration found that King was disabled as of September 2, 1987 — one week before her discharge. Therefore, King unquestionably has represented to the Social Security Administration that she has been disabled from that date. Indeed, it is her continuing representation that she cannot work, rather than the actual date of the award, which invokes judicial estoppel.

Furthermore, in her deposition, King asserted that she became disabled in 1987, while she was employed or shortly after her discharge. Her assertion now that the onset of her disability was delayed 15 months is contrary to her own testimony. In fact, King's assertion that she sought a job or wanted to work for nearly 15 months after her discharge is wholly unsupported by the record. Those unsupported

allegations are exactly the type of statements that judicial estoppel would prohibit King from asserting in light of her representations to the Social Security Administration.

Moreover, King asserts numerous times in her petition that she did not receive Social Security benefits for fifteen months subsequent to her termination (*see* Petition, pp. 9, 10, 14, 30), implying that her application for those benefits was in close proximity to the receipt of those benefits. However, if such were actually the case, she would have received her disability benefits on approximately the same day that she applied for them. This is simply not possible.

In order to apply for Social Security benefits, a person must submit an application for benefits to the Social Security Administration. 20 C.F.R. § 404.603 (1995). Once an application has been submitted, the applicant must submit evidence to the Social Security Administration that the applicant is, in fact, eligible for the benefits. 20 C.F.R. § 404.703 (1995). The type of evidence needed will be determined by the Administration, and the applicant is given enough time to collect the evidence requested. 20 C.F.R. § 404.705 (1995). Once the applicant has taken all the necessary administration steps, the Administration then reviews all the evidence and the application to determine if the applicant is eligible for the benefits requested. 20 C.F.R. § 404.900 (1995).

Obviously, all of these steps take quite some time, so it would be impossible for the applicant to receive benefits within such a short time of applying for benefits. Clearly, based upon the procedures that must be followed to receive benefits, King's implications to the contrary are virtually impossible.

Next, King asserts that her Social Security award was not based solely upon her physical inability to work but instead considered her age, limited work skills and education, as well as her physical condition. This statement is also ingenuine and is entirely unsupported by the record. King's Social Security award states that her medical providers believed her physical condition might improve and, therefore, that the Administration would reevaluate her entitlement to disability benefits in the future. That provision indicates that the Social Security Administration based its award solely upon King's physical condition. Additionally, King testified under oath that she became physically unable to work while she was still employed or shortly thereafter. Furthermore, her physical condition obviously has not improved because she has continued to receive disability benefits.

King relies upon the Fourth Circuit's decision in *Wells v. North Carolina Bd. of Alcohol Control*, 714 F.2d 340 (4th Cir. 1983), to support her assertion that judicial estoppel is inapplicable here. However, her reliance is misplaced. The plaintiff in *Wells* never asserted that he was totally disabled from working. Instead, he claimed only that he was no longer able to perform a job which required frequent heavy lifting. Furthermore, he never made any assertions about his ability to work before an earlier forum. Therefore, *Wells* is not applicable to this case.

In anticipation of Thomas' arguments, King attempts to distinguish factually the legal authority cited previously herein in support of the application of judicial estoppel. The minute factual details that King distinguishes, however, are not relevant to the issue of whether judicial estoppel should be invoked. The crucial point in all the cited cases is the fact that each plaintiff, like King, asserted before the Social

Security Administration or another judicial forum that he or she was unable to work. The various courts then used that earlier assertion to prohibit each plaintiff from making a contradictory assertion in the later judicial proceeding. As the *Reigel* court explained:

> Plaintiff in the case *sub judice* cannot speak out both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertions that she was physically unable to work.

859 F. Supp. at 970. In *Simo v. Home Health & Hospice Care*, 906 F. Supp. 714 (D.N.H. 1995), the court emphasized:

> The integrity of the judicial system is jeopardized when litigants are permitted to assume contrary factual, not legal, positions for the purpose of achieving advantageous results. The plaintiff, having already reaped the benefits of her past representations of total disability [before the Social Security Administration], may not now advance before this court any claim necessarily based on contrary factual representation.

906 F. Supp. at 721. As in *Reigel* and *Simo*, King's identical attempt to assert diametrically opposed factual allegations is barred by the doctrine of judicial estoppel.

Finally, King attempts to rely, in part, on the recent Equal Employment Opportunity Commission ("EEOC") guidelines

in order to circumvent the application of the doctrine of judicial estoppel. This reliance is misplaced because the EEOC guidelines are not applicable to the present action. This is a case brought under the auspices of the West Virginia Human Rights Act, not the Age Discrimination in Employment Act. The EEOC has jurisdiction over the latter actions, not the former.

Although courts may resort to the EEOC guidelines for guidance, they are not controlling. *Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274 (4th Cir. 1997) *citing Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 349 n.2 (4th Cir. 1996). *See also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). Rather, they may be given deference unless the interpretation is in direct conflict with the language of the statute. *Public Employees Retirement System v. Betts*, 492 U.S. 158, 171 (1989). *See also Gaddy v. Four B. Corp.*, 953 F. Supp. 331 (D. Kan. 1997).

In the instant case, the EEOC guidelines are in direct conflict with the plain language of the West Virginia Human Rights Act. The Act states that it is unlawful for an employer to discriminate against a person "if the individual is *able and competent to perform* the services required." W.Va. Code § 5-11-9(1) (emphasis added). On the other hand, the EEOC guidelines state that an individual may be totally disabled for purposes of obtaining Social Security benefits, yet still be able to perform the services required. To allow an individual to claim to the Social Security Administration that he or she is unable to do the previous work or any other work in order to obtain benefits, and then to allow the same individual to claim that he or she is able and competent to perform a job is the essence of contradiction. Consequently, the EEOC guidelines are in direct conflict with the plain language of the West Virginia Human Rights Act and, thus, are entitled to no deference by this Court.

CONCLUSION

For the foregoing reasons, respondent, Herbert J. Thomas Memorial Hospital, prays that this Court deny King's petition for writ of certiorari.

Respectfully submitted,

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